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STRICT LIABILITY AND NEGLIGENT RAPE: OR HOW I LEARNED TO START WORRYING AND QUESTION THE CRIMINAL JUSTICE SYSTEM

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"Criminal Liability is a serious matter—it is hardly the place to experiment with rearrangements of social relations."[1]

I. INTRODUCTION

When is a man[2] guilty of rape? The complexity of rape law stems in large part from the inability of the law, as well as of legal scholars, to answer this question definitively.[3] Consider the five possibilities:[4]

A man should be guilty of rape when:

He intends to have non-consensual intercourse; i.e., he *wants* the sex to be non-consensual;

He knows he is having non-consensual intercourse; i.e., he would *prefer* if the sex were consensual, but commits the sexual act knowing that it is not consensual;

He consciously disregards the possibility that he is having non-consensual intercourse; i.e., he is unsure about whether the intercourse in consensual, and decides to remain unsure;

He is unaware that he is having non-consensual intercourse, but it is *unreasonable* for him to be unaware that it is not consensual, or to believe that it is consensual;

He is unaware that he is having non-consensual intercourse, and it is *reasonable* for him to be unaware that it is not consensual, or to believe that it is consensual.

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1 Catherine Pierce Wells, *Date Rape and the Law: Another Feminist View*, in DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW, 43 (Leslie Francis ed., 1996).

2 Although it is possible for a woman to be the perpetrator of a rape, and for a man to be the victim of rape, throughout this note I will consider the rapist a man, and a woman the victim, because it avoids the necessity of writing he/she, and statistically the majority of rapists are male and victims, female.

3 *See* David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 317-24 (2000).

4 These possibilities are based on the four different kinds of culpability that the law distinguishes and the possibility of no culpability at all. *See* MODEL PENAL CODE §2.02 (1962)(hereinafter "MPC").

In three of the possibilities—the first where he acts with purpose,[5] the second where he acts with knowledge,[6] and the third where he is reckless[7]—the man is said to be subjectively at fault.[8] In the fourth possibility, where he was negligent,[9] he is said to be objectively at fault.[10] In the fifth possibility, he is considered not to be at fault at all.[11]

But is this the right approach to take to answer our question? Shouldn't we just consider that the woman, in all five situations, was subjected to unwanted sexual intercourse? And isn't that rape? And if she was raped, then didn't someone rape her? And wouldn't that make the man a rapist? But if your intuition is that in possibility five the man cannot be guilty of anything because he is not at fault, then aren't we saying that it is possible for a woman to have been raped, but that there is no rapist? Does this *reductio ad absurdum* mean that this approach is wrong and that we must focus on the fault of the man? But what then of the woman who was subjected to unwanted sexual intercourse?

This is one dilemma of present day rape law, and it can only be solved by deciding the purpose of rape law. Is the purpose of rape law to punish a person who is at fault for his conduct? Or is it to ensure that women are not subjected to unwanted sexual encounters? If the answer is the latter, then we should deem the man in all of the possibilities guilty of rape. If the answer is the former, then we would only convict a man of rape if he was at fault. If we used a subjective standard of fault, then we would find the man in possibilities one through four guilty. If we used an objective standard of fault, then we would find the man in possibilities one through three guilty.

The purpose of this Note is to explain why rape law should use a subjective standard of fault. I start with the basic principle that criminal liability should only be imposed on an actor who is morally blameworthy. In the absence of fault, there is no moral blameworthiness. That notion is embedded in the Eighth Amendment's prohibition against cruel and unusual punishment. Therefore if strict liability is unconstitutional, or—in the absence of a Supreme Court decision—rests on shaky constitutional ground, it should be considered unjust. I next explore the constitutionality of strict liability as a basis for a crime like rape. From that, I conclude that we must eliminate the possibility of holding a man strictly liable for

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[5] *See* MPC §2.02(2)(a).

[6] *See* MPC §2.02(2)(b).

[7] *See* MPC §2.02(2)(c).

[8] Subjective fault is fault determined under a subjective standard, which is peculiar to a particular person, and based on the individual's perceptions, feelings or intentions. *See* BLACK'S LAW DICTIONARY 660, 672 (2d Pocket ed. 2001).

[9] *See* MPC §2.02(2)(d).

[10] Objective fault is fault based on reference to an objective standard, which is a legal standard based on conduct and perceptions external to a particular person. *See* BLACK'S LAW DICTIONARY, *supra* note 8, at 660.

[11] *See* MPC §2.02(1) (The imposition of sanctions to a person not at fault is said to be held strictly liable. This is discussed in detail *infra*, part four.).

the crime of rape; that is, when a man is reasonable in his belief that a woman has consented to sex, he cannot be guilty of rape. The basic principle that in the absence of fault there is no moral blameworthiness, is not enough to eliminate the possibility that a man cannot be guilty of rape if he is negligent, because by an objective standard, he is at fault, and, one could argue, morally culpable.[12]

Therefore, I propose a test to determine when negligence is an appropriate standard for criminal liability. First, the crime—for which a negligence standard will impose liability—must be a serious one. Second, the use of a negligence standard must have a reasonable likelihood of decreasing the incidence of the crime. Finally, there must either be no alternatives capable of decreasing the incidence of the crime, or if there are alternatives, they must have been exhausted. I explain how rape does not pass this test, thereby disqualifying negligence as an appropriate level of culpability for criminal liability for the crime of rape. While it is doubtful that a negligence standard could decrease the incidence of rape, I focus largely on an alternative that has not been exhausted. I explain how education is an alternative that has the greatest likelihood of decreasing the incidence of rape, and that until we exhaust this alternative, we should not resort to imposing criminal liability in the absence of subjective fault.

I proceed in Part Two with a discussion of date rape and the miscommunication that can occur in that instance of rape, explaining that negligent and strict liability rape are only issues in the context of date rape. Indeed, negligent and strict liability rape were proposed for the purpose of addressing the poor performance of the justice system in the handling of date rapes.[13] This discussion provides the basis for understanding why the considerable rape reform of the last several decades, discussed in Part Three, have not brought adequate reforms to address the problem of date rape. Part Four explains why strict liability as a basis for liability is inappropriate for the crime of rape and should not be utilized under any circumstances. Part Five explains that negligence as a basis for liability is somewhat problematic and should therefore only be used on a limited basis. I elaborate on how to determine when it is appropriate to use negligence as a basis for criminal liability and explain that rape fails this test, because an alternative to a negligence standard exists as a way of decreasing the incidence of the crime. Part Six elaborates on the alternative of education and shows how it is really the only way to address the problem of date rape. Part Seven is a brief conclusion.

II. DATE RAPE

Thus far this Note has not touched on an important question: how is it possible that a man and woman could have such diametrically opposed views of a

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[12] Indeed, it is also well established that criminal liability has been imposed on the basis of negligence for serious crimes like homicide.

[13] Bryden, *supra* note 3, at 318, 323-24.

single act? In possibilities four and five of our introductory hypothetical, the man is under the genuine impression, either reasonably or not, that he is having consensual sex, whereas the woman feels like she is being raped. To understand this disparity, it is necessary to understand that "a gender gap in sexual communication exists. Men and women frequently misinterpret the intent of various dating behaviors and erotic play engaged in by their opposite-sexed partners."[14] Significantly, men may not seek overt consent to sex because they assume that a non-consenting woman will make her lack of consent known and women may perceive certain behavior as indicating that the man will rape her if she protests, even though the man did not have that intent.[15] This miscommunication explains how it is possible for a man and woman to walk away from the same sexual act with different views of what occurred.

It also provides the basis for understanding that issues about reasonable or unreasonable beliefs about a woman's consent will only arise in the context of what is known as date rape or relationship rape.[16] Date rape is defined as "rape committed by someone who is escorting the victim on a social occasion."[17] Relationship rape is defined as "rape committed by someone with whom the victim has had a significant association, often (though not always) of a romantic nature. This term encompasses all types of relationships, including . . . friends, dates, cohabitants, and spouses, in which the victim has had more than brief or perfunctory interaction with the other person."[18] In these situations, whether or not the woman consented is usually the only issue, and miscommunication can provide an explanation for the woman's assertion of rape and the man's assertion of innocence.

Indeed, most scholars now agree that there are really two distinct kinds of rape. One kind, sometimes labeled aggravated rape, involves rape by a stranger, a man with a weapon, or where the victim suffers physical injuries.[19] Scholars agree that the criminal justice system handles these instances of rape reasonably well.[20] The second kind of rape involves unarmed acquaintances—dates, lovers, neighbors, co-workers, etc.—and in which the victim suffers no physical injury.[21]

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[14] Robin D. Wiener, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 147 (1983).

[15] *Id.* at 148.

[16] The term "date rape" is sometimes used loosely to refer to what is more accurately known as relationship rape. BLACK'S LAW DICTIONARY, *supra* note 8, at 581. For simplicity, however, throughout this note I use the term "date rape" to encompass all rapes that would fall under the category of date rape, relationship rape, or acquaintance rape.

[17] *Id.*

[18] BLACK'S LAW DICTIONARY, *supra* note 8, at 581-82.

[19] Bryden, *supra* note 3, at 318.

[20] *Id*; *See also*, Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 625-28, 633 (2005) (describing aggravated rapes as the "classic rape narrative," and being the public face of rape in this country, despite the fact that in terms of incidence it is a statistical outlier, contrasted with the much more typical date rape, which she terms "All- American" rape.).

[21] *Id.*

Scholars agree that the criminal justice system has performed poorly in addressing these rapes.[22]

Before we turn to the proposed methods of confronting the justice system's inability to deal with date rape, it is necessary to understand why the reforms of the last several decades have not been adequate. For as the wise saying goes, without an understanding of history we are doomed to repeat it. If we want to make changes that will truly reform the system, we need to understand how prior reforms have failed.

III. A BRIEF HISTORY OF RAPE REFORM

Over the past few decades there has been a significant amount of reform to the law of rape and an extensive amount of literature regarding those reforms and the topic of rape generally.[23] While the subject of rape now occupies an entire chapter of one of the leading case books used in introductory criminal law classes,[24] just two decades ago, rape was not taught.[25] The reason given to feminist legal scholar Susan Estrich for this omission when she began teaching was that the topic was not "interesting enough, or complicated enough, or important enough to merit a chapter in a criminal law casebook or a week in a course."[26] The reason for changes over the last several decades can be attributed to an "alliance among feminist groups, victim's rights groups, and organizations promoting more general 'law and order' themes," seeking to reform rape statutes to accomplish various goals.[27] While each of these groups had their own reasons for promoting reform,[28] there is no question that change has occurred; rape is now widely addressed by scholars and all fifty states have made changes to their laws since rape reformers began their mission a few decades ago.[29] How to measure the success of any of the changes that have taken place depends on which of these groups' goals you choose. There is consensus that some progress has been made and that more is necessary, particularly to address the problem of date rape.[30] There is little consensus on how further progress should be made.[31]

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[22] *Id. See also* Anderson, *supra*, note 20, at 632-33 (stating that under the statutes of twenty seven states, "All-American" rape does not even constitute a crime.).

[23] RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 5-6 (Univ. of Chicago Press 1996); CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 17 (Springer 1992).

[24] SANFORD KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES, CASES AND MATERIALS, 313-86 (7th ed. Aspen 2001).

[25] SUSAN ESTRICH, REAL RAPE 6-7 (Harvard 1987); *See also* Bryden, *supra* note 3, at 317.

[26] ESTRICH, *supra* note 25, at 7.

[27] Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?* 84 J. CRIM. L. & CRIMINOLOGY 554 (1993).

[28] *Id.*

[29] *Id.* at 559; SPOHN & HORNEY, *supra* note 23, at 17.

[30] Bryden, *supra* note 3; ESTRICH, *supra* note 25, at 8.

[31] Bryden, *supra* note 3, at 323-24.

In making his argument that the law should recognize a right of sexual autonomy, scholar Stephen Schulhofer states, "[o]f all our rights and liberties, few are as important as our right to choose freely whether and when we will become sexually intimate with another person. Yet, as far as the law is concerned, this right . . . doesn't exist."[32] Indeed, achieving such a right would mean we have come very far from the origins of rape as a crime. Susan Brownmiller, a pioneer of rape reform, explains:

> A female definition of rape can be contained in a single sentence. If a woman chooses not to have intercourse with a specific man and the man chooses to proceed against her will, that is a criminal act of rape. Through no fault of woman, this is not and never has been the legal definition. The ancient patriarchs who came together to write their early covenants had used the rape of women to forge their own male power—how then could they see rape as a crime of man against woman? Women were wholly owned subsidiaries and not independent beings. Rape could not be envisioned as a matter of female consent or refusal; nor could a definition acceptable to males be based on a male-female understanding of a female's right to her bodily integrity. Rape entered the law through the back door, as it were, as a property crime of man against man. Woman, of course, was viewed as the property.[33]

We are now somewhere between these two extremes. Granting that it is difficult to define, "clearly and specifically, what an appropriate system of protection for sexual autonomy should look like,"[34] reformers of the last several decades have struggled with that task.

American statutes, with minor verbal differences, preserved William Blackstone's eighteenth century definition of rape as carnal knowledge of a woman forcibly and against her will.[35] In order to be convicted of rape, the man had to have used physical force, unless the woman was underage, unconscious or asleep.[36] The one exception was for the married man who could compel intercourse with his wife and not be subject to criminal liability.[37] Rape was punished by long prison terms or by death, but unlike other severely punished offenses, courts imposed a special set of rules to safeguard defendants from false accusations.[38] These rules—

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[32] STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 274 (Harvard Univ. Press 1998).

[33] SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 18 (Ballantine Pub. Group 1975).

[34] SCHULHOFER, *supra* note 32, at 14.

[35] *Id.* at 18.

[36] *Id.*

[37] *Id.* (British Chief Justice Lord Hale stated that, "by their matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract.").

[38] *Id.* (explaining that:

[c]ourts were obsessed with the idea that a woman might fabricate an accusation of rape, either because she feared the stigma of having consented to intercourse or because she was pregnant and needed an acceptable explanation . . . . Judges also worried that a woman might falsely accuse a man for reasons of

unique to the crime of rape—included: the complaint had to be filed promptly or prosecution was barred, independent witnesses or physical evidence had to corroborate the victim's testimony, and the victim had to have resisted her attacker physically "earnestly" or "to the utmost."[39] Courts tenaciously enforced the resistance requirement,[40] as illustrated by the following case.[41] A man forcefully held a woman down and she testified that he held her hands and feet tightly and that she could not move.[42] When she screamed for help, he threatened to use his gun. Finally, after having done "all she could," she "gave up."[43] The jury convicted, but the Wisconsin Supreme Court reversed stating, "submission . . . no matter how reluctantly yielded, removes from the act an essential element of the crime of rape . . . [and that the victim's resistance] ought to have continued to the last."[44] In a 1947 decision reversing a conviction, the Nebraska Supreme Court wrote that "carnal knowledge, with the voluntary consent of the woman, no matter how tardily given or how much force had hitherto been imposed, is not rape."[45]

In the 1950s, the American Law Institute began its project of re-examining all of American criminal law with the idea of drafting a proposal for a modern and coherent criminal code to replace existing archaic statutes.[46] When they turned their attention to rape, the reformers were "alarmed by the by the low rate of conviction in cases of serious abuse."[47] They attributed the problem to the resistance requirement, the focus on the victim's consent, and that the offense included diverse kinds of misbehavior all under the single felony known as rape, all with the same severe punishment.[48] While the proposal for a "Model Penal Code" suggested changes to reflect these problems, most of the recommendations did not break with traditional assumptions; the prompt reporting requirement and the necessity of corroborating the victim's testimony remained, and the marital rape exemption was extended to cases where the victim and assailant were living together as man and wife, regardless of whether they were formally married.[49] The Model Code's method of focusing on the victim's consent is revealing. First, the reformers acknowledged that rape law should place a greater emphasis on the consent of the woman, but they chose to sidestep the victim's consent, focusing on the man's conduct instead.[50] The Code makes it a crime when the man "compels

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revenge or blackmail.). *Id.*

39 SCHULHOFER, *supra* note 32, at 19.

40 *Id.*

41 Whittaker v. State, 7 N.W. 431 (1880).

42 *Id.*

43 *Id.*

44 *Id.* at 432.

45 State v. Cascio, 147 Neb. 1075, 1078-79 (1947).

46 SCHULHOFER, *supra* note 32, at 20.

47 *Id.*

48 *Id.*

49 *Id.* at 20-21.

50 *Id.* at 22.

her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or . . . he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants, or other means for the purpose of preventing resistance . . . ."[51] One reason for putting the focus on the man's behavior—the progressive and well-intended reason—reflected the fear of the reformers that making the woman's consent an element of the crime would result in the victim being put on trial, which they did not want; the focus of the jury's attention was to be the defendant's misconduct.[52] The second reason, reflecting the "darker side of the decision to avoid the issue of consent,"[53] was because the reformers themselves were not really sure what consent would mean.[54]

Their commentaries disparaged consent as a "deceptively simple notion" and warned: "Often the woman's attitude may be deeply ambivalent." The reformers stressed that a woman may have "a barrage of conflicting emotions at the time of the assault" and that "inquiry into the victim's state of mind . . . often will not yield a clear answer." Women were thought to be unable to express their sexual desires directly; beset by "conflicting emotions," women, in this view, might not know what they themselves actually wanted.[55]

As a result, the Code set up "an undefined but stringent requirement—*forcible compulsion*—as the only reliable indication that the woman's claims of nonconsent were genuine."[56]

The American Law Institute's work as reflected in the Model Penal Code proved highly influential during the 1960s as legislatures throughout the U.S. extensively revised their criminal laws.[57] However, the code was often used as a point of departure and even its modest recommendations were "diluted in the legislative process."[58] Legislatures followed some of the technical suggestions of the code but stopped short of adopting changes that would have the effect of extending liability, in part because of continuing concerns about the risk of false accusation and the idea that some aggression is expected of men in sexual encounters.[59] The end result of all of the legislative changes was that the "law's fixation on physically violent misconduct . . . was reinforced."[60] No state adopted the Institute's recommendation that a lesser offense be created for intercourse

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51 MPC § 213.1(1).

52 SCHULHOFER, *supra* note 32, at 22.

53 *Id.* at 23.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 SCHULHOFER, *supra* note 32, at 23.

59 *Id.*

60 *Id.* at 24.

compelled by means of threats to inflict nonphysical injuries.[61] The New York statute adopted in 1965 stated that rape was committed only when a man used "physical force that overcomes earnest resistance," or when he made a threat of "immediate death or serious physical injury."[62] The result was that "women were protected only from physical violence. Unwanted sexual imposition was not in itself a crime."[63]

The 1970s brought intense criticism of rape law, this time from feminists, who were troubled not only by the low rate of convictions in rape cases but also by treatment of victims by everyone from police investigating the crime to defense attorneys questioning them in court.[64] This treatment discouraged many women from filing complaints at all, but even when they did and the police could be convinced a crime had occurred, women were faced with another hurdle: the need for independent evidence corroborating the crime, which is a requirement singular to the crime of rape.[65] The treatment of victims in court was disturbing; the very fear contemplated by the reformers of the 1960s—that the focus would be placed on women's behavior and it would be used to show they had consented to the sexual act—had materialized.[66] Feminists' efforts to change the law and judicial interpretation resulted in the first important feminine reform statute in 1975.[67] The feminist movement coincided with another movement, this one for crime control and victims' rights, and in that atmosphere anti-rape activists found legislatures willing to adopt ambitious reforms.[68] As a result, during the 1970s virtually every state dispensed with the corroboration requirement, and by the 1980s nearly every state had enacted some type of "rape shield" law, which restricted defense attorneys from cross-examining victims about prior sexual acts.[69] In addition, reformers sought but achieved only partial success in the complete repeal of two other aspects of rape law: the marital exemption and the resistance requirement.[70] Many legislatures balked at getting rid of the marital exemption for fear that it would encourage blackmail by disaffected spouses. Reformers in turn, gave up on this point in order to ensure other reforms passed, although some states have abolished the exemption.[71] While a small number of states abolished the resistance requirement, most have not abolished it; instead they have softened it, either by statute or judicial decision, so that reasonable resistance would now be sufficient to

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61 *Id.*

62 *Id.*

63 *Id.* at 25.

64 SCHULHOFER, *supra* note 32, at 25-28; SPOHN & HORNEY, *supra* note 23, at 20.

65 SCHULHOFER, *supra* note 32, at 25-26.

66 *Id.* at 27-29.

67 *Id.* at 29.

68 *Id.*

69 *Id.* at 30.

70 SCHULHOFER, *supra* note 32, at 30.

71 *Id.*

demonstrate rape.[72] Most courts still required evidence that the victim physically resisted her attacker; verbal protests were generally insufficient.[73]

Another area of major concern was the statutory definition of force and consent: here reformers divided sharply.[74] They all agreed that the essence of the crime was the man's failure to obtain genuine consent. Some reformers however, like those in the 1960s, worried that bringing the woman's consent into the formal definition of rape would bring the woman's behavior and prior sexual history into focus in an effort to prove consent.[75] As a result, the offense of rape was defined "by describing the male behavior they wanted to prohibit," and, therefore, renewed the emphasis on forcible compulsion.[76] Not all reformers agreed that consent should not be the focus in the definition of rape and a few states did indeed focus on consent in formulating their rape statute, defining it simply as "sexual intercourse without consent."[77] The broad reach of such a formulation was deceptive, as elsewhere these states had statutory provisions stating that evidence of physical force would be required to prove the absence of consent, thereby incorporating by reference the force requirement.[78]

Cases throughout the 1980s proved that the reforms of the prior decades had little practical effect; convictions were still elusive.[79] The resulting picture of rape reform in the 1980s could be described by stating that "when convictions could be obtained, the appellate courts of the 1980s were somewhat less likely to overturn them. But in the wider universe of rape complaints and rape prosecutions, the reforms of the 1970s had little effect."[80] Significantly, "studies found that new statutes produced no significant change in reporting by victims, in prosecutors' charging practices, or in conviction rates."[81] The 1980s and '90s have seen much in the way of legal scholarship about rape and other sexual abuses,[82] but "[c]riminal law safeguards remain limited almost exclusively to protecting women from force, and 'force' still means direct physical violence, something more than the 'ordinary' physical aggressiveness that is considered a normal aspect of the male sexual role."[83]

The rape reform summarized above shows that some progress has been made but also that those reforms have not been especially helpful to victims of date rape. This can be attributed chiefly to the force requirement. While we have seen that

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72 *Id.*
73 *Id.* at 31.
74 *Id.*
75 *Id.*
76 SCHULHOFER, *supra* note 32, at 31.
77 *Id.* at 32.
78 *Id.*
79 *Id.* at 33-35.
80 *Id.* at 38.
81 *Id.*
82 SCHULHOFER, *supra* note 32, at 40.
83 *Id.* at 46.

most states have abolished the requirement that women resist their attackers, states have not abolished the requirement that force is an element of the crime,[84] which is "in reality the backdoor through which resistance remains an element of rape."[85] Rape reformers want to abolish or modify the force requirement[86], because insisting on it will necessarily exclude many cases of unwilling sex from coming within the statutory definition of rape.[87] This outcome stems from the fact that maintaining a force requirement means that victims will have to resist their attackers. A man will not use force against a woman unless he is met with resistance. This is simply intuitive; if a man wants to have intercourse with a woman and proceeds to initiate sex, he will not need to employ any degree of force unless the woman resists. Force is used to counteract resistance, so if no resistance is employed, no force is necessary. Thus, if a woman does not resist because she fears, whether reasonably or not, that she will be killed, her attacker will not need to use force, and will not come within the statutory definition of rape. This effectively means that women who don't resist their attackers in some way will not be able to win convictions against them. Professor Michelle Anderson explains that:

> In working to abolish the resistance requirement, legal reformers got it only half right. By employing the argument that resistance causes further injury to the victim. . . they may have won the battle over the resistance requirement, but they contributed to a losing war on rape. Moreover, a de facto resistance requirement continues in practice in many jurisdictions even though formally deleted from the penal codes. Because the resistance mandate was abolished for the wrong reasons, the law has been retarded from progressing forward. Legal reformers who worked to abolish the resistance requirement were correct in concluding that the requirement harms rape victims. Women's reactions to rapists vary widely and cannot meet any ideal standard of appropriate action . . . many women are cowed by the empty threat of making the attack worse if they resist a rapist. They should not be penalized for their logical attempts to remain safe . . . a woman's lack of resistance, therefore does not demonstrate that she consented to the exchange . . . [l]egally, the lack of resistance proves nothing.[88]

The inclusion of force as an element of rape has been called "fallacious,"[89] since "it is an indirect, inaccurate way of assessing the real issue—the communication of the woman's non-consent to the sexual act."[90] Therefore, most

[84] Bryden, *supra* note 3, at 321-22.
[85] *Id.* at 355-58.
[86] *Id.* at 322.
[87] *Id.*
[88] Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 992 (1999).
[89] Craig T. Byrnes, *Putting the Focus Where it Belongs: Mens Rea, Consent, Force, and the Crime of Rape*, 10 YALE J.L. & FEMINISIM 277, 281 (1998).
[90] *Id.*

scholars reject the force requirement and maintain that the critical element is the non-consensual nature of the act; force is merely an evidentiary factor of non-consent. However, force remains an element of the crime in virtually all states, and in the definition of rape in the Model Penal Code.

There is a second problem with the force requirement, which is most relevant when we are dealing with date rape. No matter how much force a man uses, it is not rape if the woman consents; that is, consent is always a defense to a charge of rape. In order to establish a defendant's guilt, the prosecutor must prove the requisite mens rea.[91] The mens rea of rape is muddled, in that it usually arises by way of defense.[92] The prosecutor does not seek to prove that a man intended to rape or was negligent in committing rape. Rather, all prosecutors seek to do is to prove every element of the statute beyond a reasonable doubt. A typical rape statute reads as follows: "A man is guilty of rape, a felony, when he engages in sexual intercourse with a female by forcible compulsion."[93] Therefore the prosecutor will prove, usually with testimony from the alleged victim, that she and the defendant had sex and that the defendant used force. There is no need to mention anything about the defendant's state of mind. Rape is a general intent crime; one does not need to intend to have non-consensual intercourse, only to intend to perform the sexual act.[94] The defendant's state of mind becomes an issue when he takes the stand. He then makes one of two possible arguments.[95] He could argue that the victim consented, that the sex was consensual, thereby making the case a "he said, she said" issue, where the jury must determine which party to believe. This kind of defense of consent is always allowed and is not controversial but does indeed account for a lower rate of conviction in rape cases. In these situations a jury is required to acquit if they are not convinced of the defendant's guilt beyond a reasonable doubt.

But there is a second avenue of defense that is controversial: the mistake of fact defense as to consent. This defense gets to the heart of the miscommunication between men and women, and as to when it is reasonable to believe that the woman has consented. The defendant is in fact acknowledging his victim's position but defending himself on the grounds that he thought at the time, although mistakenly, that she had consented. In other crimes, like theft, a reasonable mistake or an

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[91] BLACK'S LAW DICTIONARY, *supra* note 8, at 445 (Mens rea is the state of mind that the prosecutor must prove the defendant had when he committed the crime, in order to secure a convicion).

[92] Bryden, *supra* note 3, at 324-25.

[93] N.Y PENAL LAW § 130.35 (LexisNexis 1967), *amended by* NY PENAL LAW § 130.35 (2001) (striking gender exemption from Penal Law § 130.35, so that it is now the law of the state that any person who engages in sexual intercourse or deviate sexual intercourse with any other person by forcible compulsion is guilty of either rape in the first degree or sodomy in the first degree).

[94] Bryden, *supra* note 3, at 325. (Since the intent of the statute goes to the sexual act, there will always be either purpose or knowledge as to the act. However, if the defendant committed an act of rape in his sleep, or unconsciously, he could defend against a rape charge in that he lacked the requisite intent to commit the sexual act—even if he used force and the woman did not consent).

[95] This is assuming he acknowledges the sexual intercourse took place. Denying that he and the victim had sexual intercourse would be a different kind of defense altogether.

honest but unreasonable mistake, which negate the requisite mens rea of the crime, will invalidate the conviction.

To illustrate, theft is defined as knowingly taking property that is not one's own with the intent to keep it. The intent of knowledge can be read to apply only to the taking of property and not to the element that it is not one's own. Therefore, if a man leaves a restaurant and takes someone else's umbrella by mistake, reasonably believing it to be his because it looks identical to his umbrella, the court will have to decide what is the mens rea of the element that the property not be his own. If it is negligence or a greater degree of awareness—recklessness, knowledge or purpose—then proving that he was reasonable in his mistaken belief that the umbrella was his will exonerate him of the crime. However, if the mens rea is strict liability, then no matter how reasonable his belief, he will be guilty of the crime.

The formulation of rape statutes leaves ambiguity as to whether a mistake of fact defense can be raised, because either consent is not an element of the crime or there is no mens rea attached to the consent issue. The issue is left entirely to the courts, and courts are not in agreement on whether such a defense must be allowed. However, it is crucial to understand that to hold that a reasonable mistake of fact as to consent is *not* a defense, is to hold in effect that rape can be a strict liability crime. That means that if the defendant's state of mind at the time of the act was that his partner consented, and he was reasonable in believing so, but if she did not in fact consent, then he could be convicted of rape. A holding that a reasonable mistake *will* negate the requisite mens rea, is to hold that someone can be convicted for rape if he is negligent as to his victim's consent. This would mean that if the defendant's state of mind at the time of the act was that his partner consented, and he was reasonable in believing so, but if she did not in fact consent, then he *could not* be convicted of rape.

The Supreme Judicial Court of Massachusetts has held that courts do not have to instruct juries on a mistake of fact defense, even if the defendant's belief was a reasonable one,[96] thereby making strict liability rape a reality in Massachusetts.[97] The Supreme Court of Alaska, however, has held that not allowing a mistake of fact defense where the mistake was reasonable violated the due process provision of Alaska's Constitution by imposing criminal liability without criminal mental elements.[98] One legal scholar has recognized that

[96] *See* Commonwealth v. Ascolillo, 405 Mass. 456, 541 N.E.2d 570 (1989). Maine and Pennsylvania have also opted for strict liability on the consent issue. *See also* State v. Reed, 479 A.2d 1291 (Me. 1984); Commonwealth v. Fischer, 721 A.2d 1111 (Penn. Sup. Ct. 1998).

[97] Although the high court in Massachusetts ruled that courts are not required to give a mistake of fact instruction, it also did not say that courts cannot give the instruction. Indeed, in Commonwealth v. Simcock, the Mass. Appellate court noted that trial judges actually do give such instructions with frequency. 575 N.E.2d 1137, 1141 (Mass. App. Ct 1991).

[98] *See* State v. Fremgen, 914 P.2d 1244 (Alaska 1996) (holding that "refusal to allow mistake-of-age defense to charge of statutory rape would be to impose criminal liability without criminal mental elements and consequently would violate due process provision of State Constitution."). *Id.*

"consent can easily become a stumbling block for rape prosecutors, but reformers cannot enact it out of existence."[99] While it is true that consent can be a stumbling block for prosecutors and is another factor that contributes to the problem of gaining convictions in date rape cases, the decision of Massachusetts' highest court shows that it is indeed possible to effectively enact consent out of existence, and that is through the use of strict liability rape. Because the defendant's state of mind arises by way of defense, it is possible for courts to "interpret" the statute so that negligence, or no fault at all, can be the basis of a rape conviction. For the most part, courts have been reluctant to do so, but there are legal scholars who are pushing for it. Therefore, I take up the task of explaining why we should never resort to strict liability rape, and why we should resort to negligent rape only under limited circumstances.

IV. STRICT LIABILITY RAPE

Some courts have rendered convictions in rape cases on what many legal scholars consider shaky constitutional grounds. Serious criminal offenses, i.e., those that carry with them the possibility of imprisonment and social stigma, are defined not only in terms of the act but also by a mental element.[100] When courts deny the defendant the right to present a mistake of fact defense as to the alleged victim's consent, they are thereby holding that the mens rea for a rape conviction can be strict liability. Strict liability "authorize[s] liability no matter what the evidence would show about the actor's fault with regard to a particular mental element."[101] Because of the peculiar nature of the crime of rape, whereby consent can negate the criminal nature of the force element,[102] if the defendant could prove that he was not negligent as to the woman's consent, then it would negate the mens rea of the force element, making it so that no crime was committed. It is for this reason that:

> [s]trict liability has endured decades of unremitting academic condemnation. Its use has been widely criticized as both inefficacious and unjust. [Strict liability] is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. In accordance with such attacks, the Model Penal Code launched a "frontal assault" on strict

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[99] SCHULHOFER, *supra* note 32, at 36.

[100] Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815 (1996).

[101] *See* Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 830 (1999).

[102] *See supra* Part II.

liability, requiring culpability for all crimes in the code.[103]

In *Morissette v. United States*,[104] the Supreme Court stated:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[105]

The Supreme Court reaffirmed this intentionality requirement as recently as 1994.[106] However, even though the Supreme Court has established interpretive presumptions against strict liability, and suggested that the Constitution does place some limits on strict liability crimes, it has also generally upheld them.[107]

There are, however, two arguments to be made that strict liability is inappropriate to the crime of rape. The first is that strict liability developed as part of the public welfare offense model to criminally sanction, without proving intent, "a limited class of offenses which threatened the social order."[108] It has been stated that:

> the legitimacy of the public welfare offense model, with its underlying strict liability formulation is best viewed as a dynamic balance of four important indicia: (1) the risk of illegality an individual assumes when engaging in activity that is subject to strict regulation; (2) the importance of protecting public and social interest in the community; (3) the relatively small penalty involved in conviction under the offense; and (4) the insignificance of the stigma attached to such conviction. The public welfare offense model survives challenge because, taken as a whole, these factors are held to provide a legitimate alternative to the true crime model. If one or more indicia are absent, then the model's application to a specific crime suffers potential collapse.[109]

As applied to the crime of statutory rape, Professor Catherine Carpenter argues that the public welfare offense model no longer applies, and that when tested against the above indicia, the justification of the public welfare model collapses.[110] The Supreme Court has not directly dealt with strict liability for statutory rape.[111] Whatever arguments can be made that statutory rape is not a justifiable candidate

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[103] Michaels, *supra* note 101, at 831-32.

[104] 342 U.S. 246 (1952).

[105] *Id.* at 250.

[106] *See* United States v. Staples, 511 U.S. 600, 605 (1994).

[107] Michaels, *supra* note 101, at 832.

[108] Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 315 n.5 (2003).

[109] *Id.* at 319.

[110] *Id.* at 383-84.

[111] *Id.* at 332.

for the public welfare offense model, stronger arguments can be made that rape[112] is not a justifiable candidate. As applied to the four indicia above, rape suffers an even greater "collapse." There is less of an argument that adult females need protection from sexual encounters than minors do from sexual encounters for which they are not competent to give consent. In cases where strict liability would be an issue, the punishment for rape is greater than the punishment for statutory rape. For example, the punishment for statutory rape with a twelve-year-old might be greater than the punishment for a rape charge, but in that case the punishment is not based on strict liability. It would, at the very least, be the case that the defendant was negligent as to the age of his partner, and more likely that he knew it. Finally, the stigma attached to a statutory rape conviction is not nearly what it is for a conviction of rape. Indeed, the term statutory rape is a signal that the sex was consensual and is only deemed rape by operation of statute because of age.[113]

The Supreme Court's recent decision in *Lawrence v. Texas*[114] lends authority to any argument drawing a distinction between rape and statutory rape. *Lawrence* can be read to mean that "consensual, heterosexual penile-vaginal sexual intercourse in the privacy of one's home is constitutionally protected,"[115] but the court "could not have been clearer . . . that it was considering the constitutional rights of adults only. Consequently one arguing that *Lawrence* has something to say about statutory rape . . . clearly has the burden of proof."[116] Because the kind of sex at issue in a rape case, between adults, is constitutionally protected, there can be no argument that the defendant risked illegality when engaging in an activity that is subject to strict regulation—the first of the four public welfare offense indicia—because such activity is not subject to regulation.

Another argument that strict liability is inappropriate for rape rests on Alan C. Michaels' "constitutional innocence" argument.[117]

> According to the principle of constitutional innocence, strict liability is constitutional when, but only when, the intentional conduct covered by the statute could be made criminal by the legislature. In other words, strict liability runs afoul of the Constitution if the other elements of the crime, with the strict liability element excluded, could not themselves be made a crime. Otherwise strict liability is constitutional.118

Examples are helpful to understand this principle. Bigamy is defined as (i) marrying another while (ii) being married; and strict liability is usually applied to

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[112] I use just the term "rape" to refer to non-consensual sex, and "statutory rape" to refer to sex with someone under the age of consent.

[113] SCHULHOFER, *supra* note 32, at 102.

[114] 539 U.S. 558 (2003).

[115] Arnold H. Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. REV. 77, 78 (2005).

[116] *Id.* at 80.

[117] *See* Michaels, *supra* note 101.

[118] *Id.* at 834.

the second element.[119] To apply the constitutional innocence test, we exclude the "being married" element and ask whether or not the legislature could prohibit knowingly getting married. Because there is a fundamental right to marriage,[120] it would be unconstitutional to apply strict liability to the bigamy statute as it is defined. The fundamental right to marriage means that if the legislature sought to restrict marriage, the restriction would have to survive strict scrutiny, which will happen only when the law is narrowly tailored to achieve a compelling governmental interest.[121] Michaels concludes that "a bigamy statute mandating some degree of culpability with regard to "being married" would be much more narrowly tailored."[122] The principle has not been articulated by the Supreme Court, but Professor Michaels has tested his theory against Supreme Court precedent and found that "their holdings are consistent with constitutional innocence and that their rationales are often suggestive of it."[123] The idea behind the principle of constitutional innocence is that if the legislature has the power to criminalize an activity it can define the degree of care with respect to other elements of the crime by reference to the intentional conduct that the legislature is free to criminalize. For example it is a crime to knowingly ship adulterated drugs in interstate commerce. Imposing strict liability would mean convicting someone for knowingly shipping drugs in interstate commerce that the shipper had no reason to know were adulterated. Because the legislature can criminalize shipping drugs in interstate commerce altogether, it can also impose a strict liability element as to the drugs being adulterated.

The principle of constitutional innocence is based on two uncontroversial propositions of law: that the legislature may normally not punish the exercise of a fundamental right,[124] and that "punishment must be predicated on some voluntary act or omission covered by a statute."[125] By engaging in a voluntary act that is covered by a strict liability statute, the defendant can be said to have assumed the risk of using imperfect care with regard to the strict liability element.[126] However,

> [s]ome level of culpability is supplied by the actor's choice to engage in the voluntary act covered by the statute. The ability to choose not to take such action is the ground for the "measure of culpability" the Court has in mind when it says that a strict liability statute "does not require that which is objectively impossible," puts "the burden of acting at hazard" upon the person choosing to engage in the broader conduct, and requires someone

[119] *Id.* at 835.
[120] *Id.* at 854. *See* Loving v. Virginia, 388 U.S. 1 (1967).
[121] Michaels, *supra* note 101, at 854 n.140.
[122] *Id.*
[123] *See* Michaels, *supra* note 101, at 836.
[124] *Id.* at 877.
[125] *Id.* at 877-78.
[126] *Id.* at 879.

> engaging in the conduct to "ascertain at his peril" whether the relevant harm will result.[127]

When the other elements of the crime cannot be blameworthy themselves, then voluntarily engaging in them cannot serve as a basis for culpability, which is the case where the conduct prohibited by the statute, without the strict liability element, is beyond the reach of the legislature.[128]

Applying this rationale to rape would mean leaving aside the issue of consent and asking if a legislature could criminalize forceful sexual intercourse. Of course, we must presume that the force is consensual, otherwise we would be asking if the legislature can criminalize rape. The Supreme Court has never answered this question directly, although as stated above, many have interpreted *Lawrence v. Texas* as establishing that right. Although the principle of constitutional innocence does not answer the question, it would force the court to answer this question when considering the constitutionality of strict liability for rape.

The above demonstrates that there are good arguments to be made that strict liability rape is unconstitutional. Even if strict liability rape falls short of being unconstitutional, it offends traditional notions of fairness and justice. As stated above, strict liability has endured decades of unremitting academic condemnation and has been widely criticized as both inefficacious and unjust. Especially when used for a serious crime like rape, it has the ability to cause serious miscarriages of justice. Rape is a serious crime, and it is troubling that it has been very difficult to get convictions in cases where it seems that the defendant is guilty. But what about cases where it is not so clear? Prosecutors will surely still argue against allowing a defendant to present a mistake-of-fact defense. Especially in the context of date rape, strict liability presents frightening possibilities. As the discussion below will show, miscommunication and misunderstanding between members of the opposite sex is a reality. Gender and race myths and stereotypes pervade the landscape of human relations and relationships, and can be the source of honest and reasonable mistakes. While strict liability presents an easy option to gaining convictions, it does so at the expense of fairness and justice.

IV. NEGLIGENT RAPE

A different set of considerations counsel against the use of negligent rape as a standard for culpability. The above discussion on strict liability suggests that convicting someone of a serious crime based on a mens rea of negligence is as problematic as having no criminal mental element at all. After all, one who commits a crime negligently does not intend to inflict harm, and as the Supreme Court stated in *Morissette*, "[t]he contention that an injury can amount to a crime

[127] *Id.* at 879-80.
[128] *Id.* at 880-81.

only when inflicted by intention is no provincial or transient notion."[129] However, while a person acting negligently does not intend to inflict harm, he cannot be said to be free of fault. The Model Penal Code states that a person acts negligently when:

> he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and *the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation*[130] (emphasis added).

The culpability of an actor under a negligence standard does establish a degree of fault. This is so even if we believe that he was indeed acting honestly and intended no harm. Normally, we would not want to penalize someone who honestly intended no harm, and certainly not harshly. Professor David Bryden explains why in cases of rape we might want to, or at least resort to, using negligence as the measure of culpability:

> Two concerns seem to underlie the frequent willingness of courts and legislatures to convict defendants who were "merely negligent." First, certain types of conduct are extremely dangerous even if unintentional. In such situations, the need for deterrence or incapacitation of the defendant is sometimes thought to outweigh considerations of moral culpability. Second, and probably more important, subjective tests lend themselves to abuse because in some contexts it is difficult for jurors to appraise the defendant's state of mind. Thus, an objective standard can be thought of as a judicial device for preventing excessive jury leniency. Of course, one may reject these justifications. But whatever validity they have is greater in the context of rape than in the context of, say, theft, the classic example of an intentional crime.[131]

Indeed, as Bryden states, it is possible to reject these considerations, but they are not wholly without merit. The first reason, while controversial from the standpoint of any retributive view of punishment, reflects an idea that is not necessarily inconsistent with our concepts of criminal justice in general; we recognize consequences as a justifiable basis for punishment. The "more important" reason, says Bryden, is that subjective tests can be abused, especially when jurors are having a hard time appraising the defendant's state of mind; therefore, the courts prefer an objective standard as a judicial device for preventing excessive jury leniency. The court wants to prevent a jury from having to decide whether a defendant is telling the truth when he says he was honest in his belief. Essentially, the jury would have to try to make a character assessment, and such

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[129] *See supra* part IV.

[130] MPC, § 2.02(2)(d).

[131] Bryden, *supra* note 3, at 335-36.

evaluations are difficult to make. A reasonable standard is at the very least more efficient, and taking into account the definition of negligence in criminal cases, the result may be that the outcome is more often right than not.

However, while a negligent culpability standard is defensible, we should only resort to it in limited circumstances. The reason for this is twofold. First, we must not forget that we are at the lowest level of culpability and that culpability is only in reference to an objective standard. Indeed, just as there is a degree to which the negligent actor can be said to be at fault, there is a degree to which he should be considered innocent. Second, as we are making an exception to general rules of criminal culpability, it is important to keep in mind that the exception is being made for one or several reasons, and that in the absence of that reason or reasons, there is no justification from deviating from the norm. Therefore, we should adhere to a test that takes into account these considerations. If the crime for which a negligence standard will impose liability cannot pass the test, negligence should not serve as a basis for liability. The test requires, first, that the crime must be a serious one. This is because, as Bryden explains, certain types of conduct are extremely dangerous even if unintentional. Second, the use of a negligence standard will have a reasonable likelihood of decreasing the incidence of the crime. A lesser degree of culpability is imposed so that we can deter dangerous behavior or incapacitate those who have engaged in that behavior. If we are animated by a view of decreasing the incidence of the crime through deterrence or incapacitation, we should only resort to a strictly consequential justification for punishment if it indeed does decrease the incidence of the crime. Finally, there must either be no alternatives capable of decreasing the incidence of the crime, or if there are alternatives, they must have been exhausted. This part of the test is what I consider a basic principle of fairness: if two alternatives exist to address a single problem and one of the alternatives is less morally problematic, that alternative should be exhausted before resort to the other.

Rape fails this test for two reasons. First, a negligence standard is not likely to decrease the incidence of rape. Second, there is an alternative that will very likely decrease the incidence of rape, and it has not been exhausted.

A negligence standard is not likely to decrease the incidence of rape. When it comes to intimate situations involving men and women and issues of force and consent, *there is no objective, reasonable standard* for the jury to use in assessing the defendant's behavior. A court using the negligence standard is asking the jury to assess whether or not the defendant acted reasonably under the circumstances. While this may seem strange to those unfamiliar with legal scholarship on the subject, it is now generally conceded that when it comes to relationship rape there is no objective and "reasonably prudent person." Consider the following:

> Men and women talk past each other, often finding each other's views incomprehensible or outrageous. Each can claim allies from the opposite sex, but differences of opinion between men and women are especially

> sharp. Some see novelty and adventure where others see danger and a risk of death. Some see sexual desire where others see reluctance, emotional alienation, unwillingness, or fear. One person's idea of sexual pleasure is another person's nightmare. For some fear and desire are intertwined . . . [o]ne result of these perceptions is a "gender gap," with men tending to differ from women in the kinds of things they fear, and in their assessments of when another person's fears are "reasonable."[132]

With this in mind, juries considering the reasonableness of a defendant who proceeded to have sex after his partner said no will not be consistent and will most often favor the defendant. If it is this defendant's experience that no does not mean no, and further, if there are men or women on the jury for whom no does not mean no, then the defendant will likely be acquitted, despite the court believing that the woman may have voiced her non-consent and that the defendant's beliefs were unreasonable. "What makes the gender gap troublesome is that widely shared assumptions often make it reasonable for [the defendant] to think [that when a woman says no she doesn't mean it]."[133] Indeed, a defendant's case may be bolstered by the fact that if it is accepted that society's views as to what is reasonable differ, it is unfair that those accused of violating some person's views be made to suffer. "When standards are debatable and expectations have not been communicated in advance, the law ordinarily resolves doubts—and it should resolve doubts—in favor of the accused."[134] And the general approach of the law is to stay away from matters in which there is considerable debate and no consensus. "When citizens hold widely divergent views, law often declines to intervene. Criminal sanctions are normally reserved for conduct that deviates sharply from accepted social norms, demonstrating serious moral fault and inflicting grievous injury on others."[135]

With this in mind, I turn to the less morally problematic alternative. Indeed not only is this alternative more likely to decrease the incidence of rape itself, it is more likely to result in a conviction after a rape has occurred. That is because education seeks to break down the racial and gender barriers to effective communication, and to create a standard of what constitutes reasonable behavior in intimate situations. Therefore I turn now to explaining how education is the alternative that has the greatest likelihood of decreasing the incidence of rape, and that until we exhaust this alternative we should not resort to imposing criminal liability in the absence of subjective fault.

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[132] SCHULHOFER, *supra* note 32, at 48-50; *See also* DAVID M. ADAMS, DATE RAPE AND EROTIC DISCOURSE IN DATE RAPE, FEMINISM, PHILOSOPHY, AND THE LAW 36-37 (Leslie Francis ed.,1996).

[133] *Id.* at 63.

[134] *Id.* at 51.

[135] *Id.* at 48.

EDUCATION

As discussed above, for all the reform in the area of rape that has taken place the results have been limited and disappointing in the context of date rape.[136] Furthermore, rape law is generally considered to be "in shambles,"[137] inconsistent with that of other crimes,[138] and one of the criminal law's worst treated.[139] Even as major statutory reforms are still being advocated, some have come to realize that there is a "misplaced faith in the ability of the law to change long-embedded cultural norms and the behavior that manifests those norms."[140] Data has revealed that changes in legal rules do not generate noticeable changes in case outcomes, and lead two scholars to conclude that "rape law reforms play a much more secondary instrumental role than legal scholars like to believe."[141] Several legal scholars are now calling attention to the "law in action,"[142] that is, how the reality of a rape prosecution—the interpretation and application of rape laws—sharply limit their efficacy, even if the statutes do, or could be easily interpreted to, make much of what feminists assert to be rape.[143] Especially in the context of date rape, long-held cultural stereotypes regarding gender and race make successful prosecutions of such instances of rape improbable.[144] "To a large segment of American society, date rape does not deserve the same appellation or vigorous moral condemnation as 'real rape' . . . [t]his societal ambivalence towards date rape is based on a special permissiveness regarding male sexual aggression against female social acquaintances."[145] Friedland refers to this as "the culture of acceptance."[146] Commentator Sarah Gill identifies specific gender and race stereotypes that account for the law's failure to decrease the incidence, reporting of, and prosecution of date rape.[147] Among them are stereotypes such as, men are aggressive and women are submissive; women are passive objects to be "had"; black women are not raped; and women who are promiscuous are also

[136] *See* Bachman & Paternoster, *supra* note 27, at 573; Lynne Henderson, *Getting to Know: Honoring Women in Law and Fact "Just What Part of No Don't You Understand?"*, 2 TEX. J. WOMEN & L. 41 (1993).

[137] Byrnes, *supra* note 89, at 278.

[138] *Id. See also* Cavallaro, *supra* note ,100, at 815 (stating that not allowing the defense of mistake of fact is adding to a "growing array of procedural and substantive rules of law that have singular application to that offense [rape].").

[139] Byrnes, *supra* note 89, at 278.

[140] George C. Thomas III, *Realism About Rape Law: A Comment on "Redefining Rape"*, 3 BUFF CRIM. L. REV. 527 (2000); *see generally* Sarah Gill, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA WOMEN'S L.J. 27 (1996); *see also* Henderson, *supra* note 136; *see also* Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 FLA. L. REV. 487 (1991).

[141] Thomas, *supra* note 140, at 532.

[142] Henderson, *supra* note 136, at 42.

[143] *Id.*

[144] *Id.* at 41.

[145] Friedland, *supra* note 140, at 488-489.

[146] *Id.* at 489.

[147] Gill, *supra* note 140, at 32.

untruthful.[148] These gender and race stereotypes lead in turn to stereotypes pertaining specifically to date rape—date rape myths—which are responsible for impeding the successful prosecution of date rape.[149] The following are what she identifies as some date rape myths:

> (1) Aggressive or violent tactics are part of the ordinary seduction of an uncertain female. (2) If a man has had sex with a woman before, any future sexual act cannot be rape. (3) Men cannot control their sexual urges after a woman has "turned them on." (4) Normal men do not rape. (5) Men only rape women with "bad reputations." (6) Women fantasize about being raped. (7) Women cause men to rape them by their appearance and behavior. (8) Women falsely claim rape after having had sex because they want revenge, or feel jealous, guilty, or embarrassed. (9) Consent can be inferred from provocative behavior. (10) It is okay for a man to rape a woman if he has spent money on her. (11) Women who do not fight back have not actually been raped. (12) If the man does not have a gun or knife, the woman has not been raped.[150]

These myths are not only prevalent among the uninformed members of society but also pervade the criminal justice system.[151] Police officers, prosecutors, judges, and juries are all susceptible to these myths and so are less likely to, respectively, investigate, prosecute, find the defendant guilty, and give severe sentences.[152] Because the successful prosecution of rapists turns in large part on these factors which are not affected by mere changes in legal rules, unless these myths are discredited, then we can expect that for the most part, rape will not be successfully prosecuted. Two cases reveal just how different jury verdicts can be, explainable only by reference to long-held stereotypes, which statutory reform does not address, or because of the formulation of the rape statute itself.

> In a recent unreported case in Florida, the defendant was acquitted, despite the prosecution's contention that he held his victim at knifepoint while raping her. Jury members were interviewed . . . [and] the jury foreman stated, quite candidly: "We felt she asked for it the way she was dressed . . . . The way she was dressed with that skirt, you could see everything she had. She was advertising for sex."153

Conversely, in *People v. Barnes*,[154] the alleged victim "testified that she felt threatened by the defendant's statements and actions, including his "displaying the muscles in his arms," "'lectur[ing]' her," and "looking at her "funny."'[155] After

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148 *Id.* at 37-45.

149 *Id.* at 45.

150 *Id.* at 46 (Gill elaborates on only the first four as they are the "more commonly believed myths.").

151 *Id.* at 51.

152 Gill, *supra* note 140, at 55.

153 Byrnes, *supra* note 89, at 281-282.

154 721 P.2d 110 (Cal. 1986).

155 Byrnes, *supra* note 89, at 282.

intercourse, she fell asleep in the defendant's home, reported the incident to the police the next day, and the defendant was convicted of rape.[156]

In light of the inability of rape reform to achieve its goals, scholars have begun to look for alternatives solutions to the date rape problem. Some have argued for a change in the very definition of rape.[157] The alternative this Note presents is using education as a means to prevent date rape. Gill has argued that the answer to the date rape problem lies in education because of the gender and race stereotypes that are at the root of the date rape problem and the inability of the judicial system to prevent and prosecute the crime.[158] Furthermore, she discusses an educational program that she founded at the Maret School in Washington, D.C. and argues that, if implemented on a nation-wide basis, it could be effective in preventing date rape.[159] Intuitively Gill's proposal sounds like a far better idea than changes in the definition of rape or statutory reforms which seek to influence the occurrence of date rape through a greater number of prosecutions. As stated above, changes in the law do not have the affect on behavior that many would like to believe.[160] This is especially so where deeply embedded cultural, racial, and gender stereotypes are involved. On the other hand, working to dispel these stereotypes through education can prevent a rape from ever happening.

Gill has identified many rape myths but elaborates on the following four, which are the most commonly believed: (1) aggressive or violent tactics are part of the ordinary seduction of an uncertain female; (2) if a man has had sex with a woman before, any future sexual act cannot be rape; (3) men cannot control their sexual urges after a woman has "turned them on."; (4) normal men do not rape.[161]

The first myth goes to the idea that "aggression and violence are merely the "Art of Seduction."[162] This date rape myth perpetuates the idea that women who say "no" really mean "yes," but they want the male to be more aggressive or even violent and arises from general gender stereotypes regarding aggressive males and passive females.[163] The statement of Judge Cole in his dissent in *State v. Rusk*[164] exemplifies this myth.[165] Judge Cole "interpreted the victim's actions as insufficient to demonstrate lack of consent, even though she has said "no" several times, begged the defendant to let her leave, and cried. Judge Cole stated: "There is no evidence whatsoever to suggest that this was anything other than a pattern of conduct consistent with the ordinary seduction of a female acquaintance who at

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156 *Id.*

157 *See e.g.* Byrnes, *supra* note 89, at 282.

158 Gill, *supra* note 140, at 33.

159 *Id.* at 33-34.

160 *Supra* Part Three.

161 Gill, *supra* note 140, at 46.

162 *Id.*

163 *Id.*

164 424 A.2d 720 (Md. 1981).

165 Gill, *supra* note 140, at 46-47.

first suggests her disinclination." Three judges joined in the dissent and four voted to uphold the conviction.[166] While on the facts of the case Judge Cole's statement seems unwarranted, there is evidence that women sometimes do in fact say "no" when they mean "yes."[167] This means that there are certain cases where Judge Cole's statement will be warranted, and that we need to educate women, as well as men, that "no means no."

The second myth, that if a man has had sex with a woman before, any future sexual act cannot be rape, is supported by the reality that people attribute more blame to victims raped by acquaintances, than to victims raped by strangers.[168] A study of teenagers by UCLA researchers found "that 43% of the teenage boys surveyed believed that forced intercourse was okay if they had dated a girl for a long time."[169] Other studies have provided further support for this myth.[170]

The third myth, that men cannot control their sexual urges after a woman has turned them on, is also supported by the UCLA study. Of the teenage boys surveyed,

> 54% believed it was acceptable to force sex if the woman changed her mind after somehow indicating that she would have sex with him. Another study found of high school males found that 50% of respondents believed that if a female 'gets him physically excited' or 'says she's going to have sex with him and then changes her mind,' then physically forcing the female to have intercourse with him is acceptable.[171]

The myth that normal men do not rape is exemplified by a statement made by one of the jurors in the William Kennedy Smith trial: "I think he's too charming and too good looking to have to resort to violence for a night out."[172] Furthermore, studies have indicated that a significant percentage of males would commit rape if they knew they would not be punished,[173] which suggests not that all of these men are abnormal, but that they are operating in a culture of, and under the influence of, deviant attitudes.

Education could serve as an effective tool to combat the date rape problem if it is designed to foster effective communication to dispel the stereotypes and myths that are at the root of the problem. Such programs could actually prevent date rape and improve the prosecution of date rape cases.[174]

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166 KADISH & SCHULHOFER, supra note 24, at 327.
167 SCHULHOFER, *supra* note 32, at 260.
168 Gill, *supra* note 140, at 47.
169 *Id.* at 47-48.
170 *Id.* at 48.
171 *Id.* at 49.
172 *Id.* at 50.
173 *Id.* at. 50-51.
174 Gill, *supra* note 140, at 62.

> Studies testing people before and after participating in date rape prevention programs have shown that these programs change behavior related to propensity to rape. A major indicator of whether a prevention program can change behavior is whether it dispels myths about date rape. The fact that many males and females believe in gender and race stereotypes and date rape myths suggests that education is needed to dispel these beliefs . . . .Men and women might change their beliefs if the misconceptions and stereotypes that they hold are explained to them through education. In turn, this new understanding might change their behavior. 175

Education could improve the date rape problem—and even stranger—by dispelling certain rape myths. One example of a rape myth is the widely held belief that women are better off submitting to an attacker than resisting him.[176] Michelle Anderson debunks this myth and gives three reasons why women should indeed resist their attackers. First, despite widespread belief to the contrary, "a woman's physical resistance to a sexual aggressor decreases her chances of being raped and does not increase her risk for serious bodily injury or death."[177] An oft-quoted Department of Justice study to the contrary was flatly contradicted two years later by a more accurate study which determined that in cases where women tried to protect themselves, "more than four out of five rape attacks were not completed."[178] "[T]he study concluded that, in a rape attempt, 'the victim who manages to do something to protect herself has a much better chance of preventing the completion of the attack than the woman who does nothing.'"[179] A second reason for resisting one's attacker is that studies have shown that resistance may decrease the psychological damage to victims of rape. Although not conclusive, studies do suggest that "resistance itself may influence how a woman reacts to having been sexually attacked and how quickly she recovers emotionally. The studies reveal that passivity to a sexual attack correlates with psychological injury, while resistance to a sexual attack correlates with quicker psychological healing."[180]

Women very often blame themselves after a sexual attack, and self-blame is especially prevalent among women who did not resist their attackers.[181] Furthermore, women who blame themselves are less likely to report having been raped and are likely to experience a host of negative psychological reactions.[182] A third reason for encouraging resistance is that it increases the likelihood of negative legal consequences for the rapist.[183] Resistance is used by police officers and

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175 *Id.* at 63.

176 Anderson, *supra* note 88, at 957-59.

177 *Id.* at 981.

178 *Id.*

179 *Id.* at 981-82.

180 *Id.* at 987-88.

181 *Id.* at 988.

182 Anderson, *supra* note 88, at 989.

183 *Id.* at 990.

courts to determine whether or not a rape occurred, despite being removed as a formal legal requirement.[184] If resistance increases the likelihood that a rape will be deterred without increasing the physical harm to the victim, potentially decreases the negative psychological effects, and increases the negative consequences for the rapist, then we should be educating women to use resistance whenever possible.

CONCLUSION

In an effort to combat the problem of date rape, some reformers have proposed the use of negligent and strict liability rape. There are important concerns raised by this approach. First, conviction of a crime without a showing of at least some degree of guilt violates principles of fairness and justice. Second, and more importantly, this approach does not address the underlying issues that contribute to this very serious problem; namely, that date rape is a product of a culture in which racial and gender stereotypes play a greater role than many are willing to admit. A better approach would be the adoption of a comprehensive rape education program which addresses racial and gender stereotypes, discusses what constitutes reasonable behavior in intimate situations, and could prepare women to better resist an attack should they find themselves in that unfortunate situation. The most important advantage of this approach is that it is preventative: it could prevent rapes from happening in the first instance, as opposed to methods aimed at achieving easier convictions, that have little, if any, possibility of really preventing rape.

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[184] *Id.*